Supreme Court, U.S.
FILED

97 1521 MAR 16 1998

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

JAN RAZ,

Petitioner

v.

MARY A. BROWN

On Petition For Writ Of Certiorari
To The Supreme Court
of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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128 pp

WHETHER THE PRESUMPTIVE APPLICATION OF THE MECHANICS OF WISCONSIN'S CHILD SUPPORT STANDARD, PROMULGATED IN RESPONSE TO 45 CFR 302.56, IN THIS HIGHER INCOME, SHARED PLACEMENT FAMILY, VIOLATES THE PETITIONER'S 14TH AMENDMENT RIGHT TO "DUE PROCESS AND EQUAL PROTECTION OF THE LAWS" AND HINDERS HIS CONSTITUTIONAL RIGHT TO THE CARE, CUSTODY AND MANAGEMENT OF HIS CHILDREN.

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CITATION OF OPINIONS AND ORDERS ENTERED

Wisconsin Supreme Court Order:

In re the Marriage Of: Jan Raz and Mary Brown, D.D.S., 215 Wis. 2d 421 (Wis. Sup. Ct. Table of Dispositions, 1997) (See Appendix A).

Wisconsin Court of Appeals Decision:

In re the Marriage Of: Jan Raz and Mary Brown, D.D.S., Case No. 96-1997 (See Appendix B).

Trial Court Findings And Order Amending Judgment:

In re the Marriage Of: Jan Raz and Mary Brown, D.D.S., Case No. 90 FA 903 638 (Milwaukee County Circuit Court, June 17, 1996) (See Appendix C).

STATEMENT OF JURISDICTION

The order from which the petitioner seeks review was entered on December 16, 1997. There have been no rehearings or extensions of time to file this petition.

The petitioner believes this Court's jurisdiction to review on a writ of certiorari the order in question is conferred by 28 U.S.C. §1257(a).

This Court should also note that this Petition draws into question the constitutionality of Wisconsin regulations and accordingly, 28 U.S.C. §2403(b) may apply. Therefore, three copies of this Petition will be served upon the Attorney General for the State of Wisconsin.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article XIV, Section 1 of the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45 CFR 302.56(c)(1) (See Appendix D)

Wisconsin Administrative Code § HSS 80 (See Appendix E)

Wisconsin Statute §49.90(1m):

Each spouse has an equal obligation to support the other spouse as provided in this chapter. Each parent has an equal obligation to support his or her minor children as provided in this chapter and chs. 48 and 938. Each parent of a dependent person under the age of 18 has an equal obligation to support the child of the dependent person as provided under sub. (1)(a)2.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE (Cont.)

Wisconsin Statute §765.001:

Title, intent and construction of chs. 765 to 768. (1) TITLE. Chapters 765 to 768 may be cited as "The Family Code."

(2) INTENT. It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children

and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

(3) CONSTRUCTION. Chapters 765 to 768 shall be liberally construed to effect the objectives of sub. (2).

STATEMENT OF THE CASE

The marriage of Jan and Mary Raz lasted from December of 1979 to December of 1991, during the course of which they had two children, Kelly (born January 15, 1984), and Cathleen (born September 25, 1986). Kelly and Cathleen were ages seven and five, respectively, when the divorce judgment was entered. They are presently ages fourteen and eleven.

The court approved the divorce stipulation granting the parties joint custody of the children and Mary primary placement, with Jan getting significant periods of secondary placement. As for financial obligations, Jan agreed, based on the parties' respective incomes, to pay $2,100.00 per month in child support.[1] At the time of the divorce, Jan was earning $9,688 per month while Mary was earning $2,674 per month. Jan was not required to pay maintenance.

On April 12, 1995, Jan filed a motion seeking primary placement of the children on the grounds Mary was attempting to alienate the children from him. Concurrently, Jan also filed an independent motion seeking modification of the child support order under the then-existing placement arrangement, asserting there had been a substantial change of economic circumstances. In accordance with

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[1] Although Wisconsin had child support percentage standards promulgated by the Department of Health and Social Services at the time of the divorce, they were not used in determining the proper level of child support, as referenced on page 4, item 13 of the court order.

local rules, the child support motion was scheduled before a family court commissioner while the motion addressing placement was referred to the circuit court judge assigned to the case.

On May 16, 1995, a family court commissioner conducted a hearing on the child support motion, found there had been a substantial change of circumstances, and ordered Jan's child support payment reduced to $1,500.00 per month, effective May 1, 1995. The commissioner arrived at this amount through application of the "new" HSS 80 Child Support standard. (See Appendix E). The commissioner's order authorized either party to seek a judicial review of the child support order "without filing review papers." On October 24, 1995, Jan requested judicial review of the commissioner's child support order, availing himself of the statutory procedure which allows a party to have the matter heard *de novo*. On December 19, 1995, Mary filed a countermotion to increase the commissioner's child support order.

By the time the trial court conducted the *de novo* hearing on April 23 and 24, 1996, Jan had elected to proceed *pro se*. At the hearing, the parties stipulated to maintain the existing placement schedule with only minor changes. The court found Jan's physical placement responsibilities for the two children constituted 36% of their total placement. This left only the child support order to be resolved.

The trial court took testimony by both parties, as well as an expert witness, as to the parties' financial situations. The trial court found Jan's monthly income to be $9,032.00 and Mary's

monthly income to be $9,543.00. The trial court further found reasonable Jan's monthly budget expenses of $3,840.00 as well as Mary's monthly budget expenses of $4,920.00. Finally, the trial court did not dispute that Mary's monthly expenses on behalf of the children were $1,800.00 while Jan's monthly expenses for the children were $900.00.

Jan, however, noted that were the child support standards mechanically applied in this manner, the $1,800[2] he would be obligated to pay Mary each month coupled with the $900 he was paying monthly to directly support the children would impose on him a total monthly financial obligation for the children of $2,700, or 30% of his $9,032 monthly gross income. Jan observed that by contrast, application of the standards would impose on Mary a total obligation for the children of $0 per month, or 0% of her $9,543 monthly gross income.

Noting this allocated $220 per day to Mary but just $42 per day to him to care for the same children, Jan requested the court find this disparity unfair, deviate from the application of this standard and define a child support award which would, as Wisconsin law requires, impose roughly equal financial obligations upon the parties to support their children. Jan

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[2] The base child support obligation under the percentage standards for two children is 25% of gross income. However, a parent who has 36% of placement such as Jan is deemed a shared time payer and is entitled to a percentage reduction which reduces the base obligation by approximately 20%.

suggested the stated intent of the standard could be roughly achieved by entering a monthly child support order in the amount of $600, which would make his total monthly obligation $1,500 while Mary's would be $1,200. This, he observed, would allow him $151 per day and Mary $157 per day to care for the children.

The trial court, however, rejected Jan's request and strictly applied Wisconsin's child support standards, (See Appendix E), and ordered Jan to pay monthly support to Mary in the amount of $1,806.00. In so doing, the trial court appeared to misapprehend Jan's position by myopically and cynically assuming Jan's complaint was that strict adherence to the guidelines unfairly allowed Mary a disproportionate advantage in discretionary income. In fact, the focus of Jan's position was not individual economics, but instead, parental obligations and more specifically, that strict application of the guidelines defeated legislative and departmental intent to distribute the child support burden equally between the parents.

The trial court, however, focused on the fact that after payment of support, Jan would have net disposable income of $4,250.00 per month while Mary would have $8,253.00. Thereafter, the court, citing *Luciani v. Montemurro-Luciani*, 544 N.W.2d 561 (Wis. 1996), (See Appendix F), concluded it could not deviate from the guidelines since:

> [T]he Supreme Court said the numbers alone aren't enough, and what's been presented here are numbers.

The court reasoned that since Jan had not demonstrated a hardship to himself or the children, there was nothing unfair in applying the guidelines. Then, adding insult to injury, the court even awarded Mary one of the tax exemptions for the children.

On June 7, 1996, the trial court entered an order entitled "Findings and Order Amending Judgment" reflecting the above-referenced disposition. On July 10, 1996, Jan, still proceeding *pro se*, filed a Notice of Appeal from the June 7, 1996, order raising, *inter alia*, the following issue:

> Did the trial court err by not finding that the application of the child support standard in this case was **UNFAIR** to the father and the children and not modifying the amount of child support payments determined by the robotistic application of the mechanics of the HSS 80 child support standard?

(Emphasis added). In his *pro se* brief, Jan argued that application of the standards had deprived him of equal protection of the law as required by the United States Constitution.

On September 16, 1997, the Wisconsin Court of Appeals, District I, affirmed the lower court's order in its entirety. (See Appendix B). Construing Jan's argument to be little more than an attempt to distinguish his case from *Luciani*, and focusing on the more pedestrian of Jan's arguments (e.g., income disparity causes parental strife thereby harming children), the court of appeals affirmed the lower

court's order and recommended its decision for publication.[3]

In so doing, the court of appeals refused to address Jan's equal protection argument. The appellate court reasoned Jan had not adequately raised the claim before the trial court, despite a body of caselaw allowing appellate courts to consider constitutional issues raised for the first time on appeal if justice so requires and the parties have an adequate opportunity to brief the issues. *See e.g., Wirth v. Ehly*, 287 N.W.2d 140, 145-46 (Wis. 1980), and despite Jan's cite to *Haines v. Kerner*, 404 U.S. 519 (1972) for the proposition that the pleadings of a *pro se* litigant should be liberally construed.

On October 10, 1997, Jan petitioned the Wisconsin Supreme Court to review the decision of the court of appeals. On December 16, 1997, the Wisconsin Supreme Court denied Jan's petition. (See Appendix A).

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[3] The court of appeals decision has now been published in Wisconsin. *In re the Marriage of Jan Raz v. Mary Brown, D.D.S.*, 570 N.W.2d 605 (Wis. Ct. App. 1997).

ARGUMENT

I. THERE IS A LACK OF CONSTITUTIONAL CONSISTENCY IN THE VARIOUS CHILD SUPPORT GUIDELINES BECAUSE WISCONSIN AND A MINORITY OF STATES HAVE ADOPTED GUIDELINES WHICH, UNDER MANY CIRCUMSTANCES, SHIFT A DISPROPORTIONATE SHARE OF RESPONSIBILITY TO SUPPORT CHILDREN UPON THE LESSER-PLACEMENT PARENT.

Under 45 CFR 302, et. seq., a state wishing to receive federal funding must, among other things, establish presumptive child support guidelines for the use of its courts. One aspect of that federal law particularly germane to this petition is that the state guidelines must be based on the income of the "absent parent." 45 CFR 302.56(c)(1). (See Appendix D). Federal law does not require, however, that the guidelines factor in the income of the other parent or distinguish between an absent parent and a parent who shares in the placement responsibilities for the child.

A majority of states responded to this federal directive by establishing guidelines consistent with the recommendations of a 1987 report entitled "Development of Guidelines for Child Support Orders." The authors of that report discovered that while parents do spend more money on their children as the family's income *increases*, the overall percentage of total family gross and net income spent on children actually *decreases*. Therefore, to effectuate the policy that children should receive support at the level they would have received had the marriage remained intact, and to ensure each parent contributes an

equal portion of their income to support their children, the panel recommended child support guidelines be structured to consider the income of both parents.

Wisconsin, however, along with four other states, eschewed this recommendation and adopted guidelines which consider only the income of the lesser-placement parent, unless a significant percentage placement threshold is crossed. Consequently, lesser-placement parents in Wisconsin must contribute a set percentage of their gross income, regardless of the combined family income or the economic needs of the children.[4] While the difference between the two different state models may be insignificant for families with average and below average family incomes, in families where there is above average income, the guidelines compel the lesser-placement parent to pay a substantially larger percentage of his or her income to support their children than the greater-placement parent.

The lack of uniformity among the states' presumptive child support guidelines, however, does not stem merely from differences in how, or whether, the income of the greater-placement parent is treated. There are also differences in what recognition is given funds expended by the lesser-placement parent to directly support his or her children. In response to the recent trend of both parents sharing in the responsibilities of raising their children, and therefore, both

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[4] A third category of eight states use this same approach but considers the noncustodial parent's net, instead of gross, income.

spending resources to directly support their children, some states account for these expenses in their child support guidelines.

Other states like Wisconsin, however, have not yet established a presumptive method to account for the shifting of expenses from the greater-placement to the lesser-placement parent, or do so improperly. In those states, to varying degrees, it has been legislated, *de facto*, that lesser-placement parents are allotted a smaller *per diem* allocation of the funds available to support the same child.

This lack of uniformity among the states not only raises questions of fundamental fairness, but presents problems relative to enforcement. In light of the growing interstate enforcement of child support awards, the disparity in approaches raises a variety of problems. The crux of the problem is well illustrated by this case - where the petitioner's presumptive child support order of $1,806 monthly would have been a mere $320 had his family traded the green pastures of Wisconsin for the blue ridges of Virginia.

The mechanics of Virginia's child support guidelines result in both parents contributing equal portions of their income to support their children. Just as important, they allocate each parent an equal per diem level of child support funds to care for their children. Wisconsin's standards, as demonstrated by this case, achieves neither of these results.

The lack of uniformity among the states will continue to foster needless

litigation, complicate the collection of unpaid support and undermine public confidence in the fairness of government until this Court intercedes and requires that child support guidelines offer equal protection to all parties. Until that occurs, one can surmise there will be a great deal of resources expended to litigate (and in some cases create) jurisdictional issues. One might also imagine the reluctance of a state like Virginia to extradite a resident to Wisconsin to face incarceration or other penalties for failure to pay support when the resident is paying even more in child support than Virginia would require.

A decision by this Court establishing that the obligation to support one's children must be the product of both parents' incomes, borne equally by both parents, and that children are entitled to an equal per diem support amount in both homes would establish a national fundamental standard of fairness for states to follow when customizing their own guidelines by choosing how they will effectuate that requirement.

II. THE PRESUMPTIVE APPLICATION OF WISCONSIN'S CHILD SUPPORT STANDARDS IN HIGHER INCOME, SHARED PHYSICAL PLACEMENT FAMILIES, AS REQUIRED BY THE WISCONSIN SUPREME COURT IN LUCIANI V. MONTEMURRO-LUCIANI, 544 N.W.2D 561 (WIS. 1996), RESULTS IN A HIGHLY SKEWED PER DIEM ALLOCATION OF CHILD SUPPORT FUNDS TO THE PETITIONER ($42) AND THE RESPONDENT ($220) TO CARE FOR THE SAME CHILDREN, THEREBY VIOLATING THE PETITIONER'S 14TH AMENDMENT RIGHT TO "EQUAL PROTECTION OF THE LAWS" AND INFRINGING UPON HIS DUE PROCESS RIGHT TO MAKE DECISIONS REGARDING THE CARE, CUSTODY AND MANAGEMENT OF HIS CHILDREN.

A. Overview

The parent-child relationship has long been acknowledged to have a constitutional dimension. The United States Supreme Court in *Quilloin v. Walcott*, 434 U.S. 246 (1978), wrote:

> We have recognized on numerous occasions that the relationship between parents and child is constitutionally protected.
>
> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Id. at 255, *citing Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). It is now firmly established that freedom of personal choice in matters of family life is one of the liberties protected by

the due process clause of the Fourteenth Amendment. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-640 (1974).

The Equal Protection Clause of the Fourteenth Amendment preserves a role of equality, and standing by itself prohibits legislation which restricts the rights and freedoms of one individual class but not of another similarly situated. While this general rule has been subject to limitation by the legislature and the courts, the Equal Protection Clause contained in the Federal Constitution continues to command that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a directive that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

In *Mclaughlin v. Florida*, 379 U.S. 184 (1964), the Supreme Court established the present Fourteenth Amendment Equal Protection standard. According to the Court:

> [C]lassification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.' . . . '[A]rbitrary selection can never be justified by calling it a classification.'

Mclaughlin, 379 U.S. at 189, *quoting Gulf, C. & S.F.R. Co. v. Ellis*, 165 U.S. 150, 155 (1897). Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal

application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. *See Mclaughlin*, 379 U.S. at 190.

Child support schemes such as Wisconsin's establish numerous classifications worthy of examination. Most poignant to this petition, however, is the different treatment accorded lesser-placement versus greater-placement parents. It is this classification, and the effect it has on a parent's fundamental right to care for his or her children, that will be examined in this petition.[5]

B. The Disparate Treatment Of Lesser-Placement Parents Is An Arbitrary Classification Without Rational Basis.

In shared placement families, when two custodial parents of the same children are both assuming a placement role in raising the children, they are like persons in like circumstances. Indeed, beyond the obvious difference in gender and perhaps a somewhat different percentage of placement, each parent is very similarly situated. Each must provide

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[5] Though not examined in this petition, it should also be noted that while the child support scheme may be facially gender neutral, in shared placement and/or higher income families it has an overwhelmingly disparate impact upon men versus women, since the vast majority of lesser-placement or noncustodial parents are men.

an environment which will accommodate their children's needs and directly support the children during their respective periods of placement. An even more germane similarity is that each will need a similar per diem amount of funds for this purpose.

As this case illustrates, however, despite the fact that from the standpoint of parenting, these two people have far more similarities than differences, Wisconsin's child support standards ordain vastly different treatment. (See Appendix E). Indeed, given that Wisconsin's express intent, when applied to the Raz family, is that the Raz children enjoy a post-divorce standard of living based on an average expenditure of $155 per day, the court order allocating $42 per day to the parent caring for the children 11 days per month and $220 per day to the parent caring for the children 19 days per month, manifests the magnitude of the disparate treatment.

Wisconsin's child support standards run afoul of the Fourteenth Amendment Equal Protection standard because, among other things, they arbitrarily require lesser-placement parents in higher income families to provide a greater-percentage of their income to support their children. This, in turn, allows greater-placement parents to escape what is supposed to be an equal obligation to support their children.

Nowhere is the inequity of this scheme illustrated more starkly than in the present case where Jan is called upon to ante up 30% of his gross income while Mary is relieved of sharing any of her significant income to support the same children. Like so many lesser-placement

parents, Jan is expected to and does provide the same services as Mary to care for his children, but is allowed only a sliver of the child support pie to assist him in doing so.

There is no rational basis for treating lesser-placement parents, and more importantly, children, in this fashion. No state objective is achieved. On the contrary, the state's primary objective - securing the best interests of the children - is actually undermined significantly by a protocol that fosters placement litigation. Under Wisconsin's guidelines, winning primary placement in higher income, shared placement families not only emotionally enriches one's relationship with one's children, it also economically enriches one's relationship with one's pocketbook. This is so because an award of primary placement shifts a disproportionate amount of financial responsibility for supporting the children onto the lesser-placement parent.

Such child support guidelines do not merely erode the touchstone for divorce litigation, they further undermine the state's express goal of imposing an equal support obligation on both parents:

> Each parent has **an equal obligation** to support his or her minor children as provided in this chapter and . . .
>
> Wis. Stat. 49.90(1m)(emphasis added).
>
> (2) Each spouse has **an equal obligation** in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor

children and of the other spouse. **No spouse may be presumed primarily liable for support expenses** . . .

(3) Chapters 765 and 768 **shall** be liberally construed to effect the objectives of sub(2).

Wis. Stat. 765.001 (emphasis added). Thus, Wisconsin's child support standards do not merely passively fail to further any reasonable state objective, in fact, they actively undermine express state objectives to make parents equally responsible for supporting their children.

The disparate treatment that lesser-placement parents receive by virtue of this arbitrary classification does not, however, merely infringe upon their right to equal treatment. Indeed, as discussed in the following section, the child support standards work a much more insidious infringement - they interfere with a parent's fundamental right to the care, custody and management of his or her children.

C. Wisconsin's Child Support Standards Operate To Infringe Upon Lesser-Placement Parents' Fundamental Right To The Care, Custody And Management Of Their Children.

1. The nature of the right

Although not explicitly mentioned in the United States Constitution, a parent's right to participate in the rearing of children is clearly a fundamental right which is constitutionally protected. *Wisconsin v. Yoder*, 406 U.S. 205, 213-214 (1972); *Zablocki v. Redhail*, 434 U.S. 374,

384-385 (1978). The Supreme Court long ago emphatically declared that a parent's right to "**the companionship, care, custody and management of his or her children**" is an interest "far more precious" than any property right, *May v. Anderson*, 343 U.S. 528, 533 (1953) (emphasis added), and:

> an important interest that understandably warrants deference and, absent a powerful countervailing interest, protection.

Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).

The constitutionally protected liberty in family relationships and child rearing is not a recent innovation. Indeed:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Yoder, 406 U.S. 205 at 232. A child is not a mere creature of the state.

> Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

2. The child support standards deprive lesser-placement parents of discretionary funds they would otherwise have available to raise their children.

Wisconsin's child support standards, (See Appendix E), violate lesser-placement parents' rights to raise their children in this fashion because they ignore the economic reality of non-intact families. In such families, both parents, to provide their children a similar living, incur similar fixed expenses for housing, transportation and daily expenses of food and entertainment. While the amount each parent needs monthly may be different, based upon greater or lesser placement, the amount each parent needs on a daily basis is roughly equivalent.

The application of Wisconsin's child support standards, however, frustrates this balance by shifting such a disproportionate amount of the total child support funds to the greater-placement parent that the lesser-placement parent is left an inadequate per diem amount to pay for the children's basic needs, much less expend discretionary amounts on the children. In so doing, the standards infringe upon the lesser-placement parent's fundamental right to "the custody care and nurture of the child" and "freedom of person choice in matters of family life" by depriving this parent of funds needed to provide the standard of living to which the State has established the children are entitled.

The present case, where the total child support funds available are allocated such that the greater-placement

parent enjoys a $220 per diem level of support while the lesser-placement parent is allowed a $42 per diem level of support, illustrates the gravity of the problem. The dramatic shifting of child support funds from the lesser-placement parent to the greater-placement parent will logically have a detrimental impact upon the lesser-placement parent's ability to raise his children.

The impact, however, is not felt solely by the parent although it is his constitutional rights which come most clearly in focus. When a lesser-placement parent is paying a disproportionate amount of income for support, such that he or she can no longer afford a meaningful relationship with the children, the children's right to a relationship with the lesser-placement parent is also needlessly endangered, and the rights of both parent and child are impinged:

> A parent's right to the preservation of this relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult.

Franz v. United States, 707 F.2d 582, 595-599 (D.C. Cir. 1983).

There is no rational basis, much less a compelling State interest, in establishing for children two households, each with a widely disparate standard of living. Once a child's basic needs are met, the quality of the child's standard of living with a particular parent should not be legislatively mandated but instead, should be an expression of that parent's values.

While there is a legitimate state interest in requiring parents to provide their children with basic necessities, government is not allowed, in the absence of compelling state interest, to subordinate the fundamental rights of parents by establishing, via legislative fiat, a distinct economic sphere in each household. Any perceived dichotomy created by Wisconsin's support laws between intact, as opposed to non-intact families, with regard to parental prerogatives in discretionary spending on children, is not a constitutionally permissible exercise of governmental power since it impinges upon the fundamental right to establish a home and to raise children without governmental interference in the absence of a compelling state interest:

> **[T]here is a fundamental right to establish a home and to raise children without governmental interference.** This right has been recognized in a wide variety of contexts by the United States Supreme Court, the federal courts and the Wisconsin Supreme Court. While that right is not absolute, we are persuaded that it is a basic right with which the state may not interfere absent a

> **compelling reason for doing so** and that the interest in "maintaining the integrity of [a] family unit" is sufficient to rise to the level of a fundamental right which may not be invaded by the state on a mere rational basis test.

Matter of A.M.K., 312 N.W.2d 840, 847 (Wis. Ct. App. 1981) (emphasis added).

This proposition is acutely true in this particular case. First, the amount taken bears no relationship to the actual needs of the child. Second, the percentage standards only take from a lesser-placement parent, and contain no requirements that any of the property taken will, in fact, go to the child. While the law has a well-founded goal, it does not accomplish its purpose.

For this reason, the percentage standards do not comply with due process requirements under even the less stringent rational basis test. *See also In re Marriage of Parrett v. Parrett*, 432 N.W.2d 664 (Ct. App. 1988) (rejecting mechanical application of child support guidelines and allowing deviation to avoid "irrational" relationship between support and children's "needs").

3. The child support standards unconstitutionally obligate lesser-placement parents to finance a lifestyle contrary to their values.

It is not, however, merely the resultant diminishment of funds which affects lesser-placement parents' fundamental right to raise their children

as they see fit. Indeed, this right is further eviscerated because the income of lesser-placement parents is conscripted to underwrite a lifestyle which may be completely at odds with their values.

The fundamental right to the management and companionship of one's children does not evaporate simply because of a divorce. Freedom of personal choice in family life is a liberty interest protected by the Fourteenth Amendment:

> A parent has a constitutionally protected liberty interest in the companionship and society of his or her child. . . . [which] logically extends to protect children from unwarranted state interference with their relationships with their parents.

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987);

Although the state has an interest in the basic welfare of children, that interest is not superior to that of either parent. Expenditure of child support money is within the legitimate interest of **both** custodial parents insofar as it relates to the care and management of their children:

> The custodial parent should not lightly be stripped of her ability to make decisions concerning rearing her child. Eliminating a custodial parent's right to make spending decisions is more akin to altering the parent's custodial powers than it is to a modification of the amount of child support.

Resong v. Vier, 459 N.W.2d 591, 596 (Wis. Ct. App. 1990).

The father is the payor spouse in a majority of divorce cases. Unless his parental rights have been terminated, the father retains a recognized constitutional equal right to participate in the development of his children. There is no distinction between a father's and a mother's rights and responsibilities vis-a-vis their children. *See, Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Based on the foregoing reasons and authorities, it is unconstitutional to deprive a parent of the fundamental right to promote his own parental values by redistributing the discretionary use of his income in such a way that requires him to finance the inculcation of values contrary to his own. The respondent may wish to shower the children with the trappings of a material society. That is, after all, her parental prerogative and she possesses an equally protected right to raise, educate and manage her children as she sees fit when they are in her home.

The petitioner, however, as a joint custodian, cannot be forced by the government to bankroll her attempts to raise the children (assuming she spends the money on the children) in a manner which is diametrically contrary to his parenting philosophy without violating his constitutional rights. Such an award could severely undermine the petitioner of his ability to teach his children the value of a frugal lifestyle, hard work and its rewards, and his philosophy that the

spiritual aspects of life transcend the material ones.

Despite the fact there may be a consensus that "the more money spent on children, the better," this has never been the touchstone of Constitutional analysis. While some may argue luxuries such as designer tennis shoes, professional sports apparel, remote control cars, Nintendo™, etc., may be beneficial to children, the ultimate decision whether to provide such amenities is a value judgment. Amish and Mennonite societies serve to remind us "the more the better" is not a universally embraced ideal.

Justice Yeltis, concurring in the Minnesota Supreme Court case *Moylan v. Moylan*, 384 N.W.2d 859 (Minn. 1986), recognized the importance of this province reserved to parents when he reasoned the legislature could not pass a statute requiring married parents to provide a minimum dollar for their children beyond adequate food, clothing and medical care:

> This is because some families, even with great financial resources, might want to raise their children in a spartan atmosphere in order to impress upon their children the value of money and the sacrifice and effort required to raise it. Other parents might be extremely generous, granting their children material privileges few other children will ever see or experience in their lifetimes. Such is life. Our courts, in interpreting our constitution and our laws, do not mandate equality in lifestyles; they

> only mandate that all citizens have equal opportunity before the law.

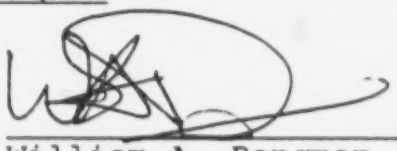
Moylan at 866.

Where a family has remained intact, there is no debate engendered over the constitutional permissibility of government seeking to inject itself into this value-laden sphere of influence reserved to parents. The specter of the government invading the sanctuary of an intact home and ordering parents to forsake other responsibilities of life and their role as parents to earn ever increasing amounts of money to feed this materialism is so repulsive that no one would dare question the unconstitutionality of such a usurpation. It is no less repulsive, no less unconstitutional, simply because the family has been broken. Divorce does not diminish the full voltage of the parental rights at stake.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that the United States Supreme Court grant his petition.

Dated: March 12, 1998



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